2004

David L. Orlob v. Wasatch Medical Management, a Utah general partnership : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DAVID L. ORLOB, Appellee and Cross-Appellant, -vs- WASATCH MEDICAL MANAGEMENT, a Utah general partnership, et al, Appellants and Cross-Appellees.	Court of Appeals No. 20040216-CA Case No. 910901061CN

CROSS-APPELLANT'S REPLY BRIEF

APPEAL FROM A FINAL JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, HON. WILLIAM B. BOHLING DATED FEBRUARY 10, 2004

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ARGUMENT

I. THIS COURT'S DECISION IN *ORLOB I* ESTABLISHED AS THE LAW OF THE CASE THAT THE CONSIDERATIONS OF GREATEST VALUE IN THE COMBINED AGREEMENT WERE THE PERSONAL COVENANTS BY ORLOB.

Cross-Appellees' Brief in Response to Cross-Appellant's Opening Brief (hereinafter "Opposition Brief") seeks to argue that Orlob's personal covenants were without value. This Court already ruled, in *Orlob v. Wasatch Management,* 2001 UT App. 287, 33 P.3d 1078, contained in the Addendum to the Opening Brief of Appellants, at Tab A (hereinafter "*Orlob I*"), that those personal covenants had more value than any other aspect of consideration under the terms of the Combined Agreement, itself:

> The Combined Agreement required the purchase and sale of physical assets and the performance of certain covenants. The physical assets of PCG had a contract price of $15,000. ***The parties attached greater value to the covenants to assist in the transfer and maintenance of accounts and not to compete.*** Without these covenants, whatever good will and reputation being transferred could be undermined by competition from either Orlob or PCG. The parties agreed that the covenants of the Combined Agreement were worth more than $500,000 during its term. ***Without Orlob's personal covenants and promises, and personal assistance and involvement, the agreement would have little value.*** Thus, we conclude that Orlob has an individual interest in the Combined Agreement, which is tied to his covenants to assist in the transfer and maintenance of accounts and not to compete.

Orlob I, ¶ 19, 33 P.3d at 1082 (emphasis added). This Court's construction of the Combined Agreement was made as a matter of law and was binding upon the

trial court on remand.[1] Likewise, this Court is not free to disregard the legal statements of its prior decision. *See generally id.* Pronouncements of an appellate court on legal issues become the law of the case and must be followed in subsequent proceedings. *See Bailey-Allen Co., Inc. v. Kurzet,* 945 P.2d 180, 185 (Utah Ct. App. 1997). "Horizontal stare decisis . . . requires that a court of appeals follow its own prior decisions. This doctrine applies with equal force to courts comprised of multiple panels, requiring each panel to observe the prior decisions of another." *State v. Menzies,* 889 P.2d 393, 399 n. 3 (Utah 1994).

II. THE OPPOSITION BRIEF INCORRECTLY CONFUSES THE TRIAL COURT'S FINDING OF FACT NO. 23, THAT CROSS-APPELLANT APPEALS, WITH OTHER FINDINGS THAT ALREADY REDUCE THE INCOME STREAM DERIVED FROM ORLOB'S PERSONAL COVENANTS.

The Opposition Brief argues that Orlob should receive nothing because he breached his personal covenants by (1) failing to deliver Dr. Hamilton at 6%, (2) failing to assist adequately with the Payson physicians, and (3) failing to "do anything" after the first six months to assist in maintaining the transferred accounts. None of those issues have anything to do with Finding of Fact No. 23, which is the sole finding at issue in Cross-Appellant's appeal.

In any event, the trial court's Findings of Fact and Conclusions of Law, as well as findings upon the record at trial, disposed entirely of those issues, with the

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[1]"Under the law of the case doctrine, issues resolved by this court on appeal bind the trial court on remand, and generally bind this court should the case return on appeal after remand." *Gildea v. Guardian Title Co.,* 2001 UT 75 ¶ 9, 31 P.3d 543, 546.

trial court imposing what it determined, under the facts and the law, to be appropriate reductions in the income stream.[2] The trial court specifically made a finding as to the appropriate remedy for the Hamilton breach, Finding of Fact No. 16, and imposed a reduction on the monthly income flow. The trial court specifically made a finding with respect to the Payson doctors that any breach by Orlob was unrelated to the reduction in income from those doctors. *See* Finding of Fact No. 17. The trial court's "Schedule of Commission Payments" attached to its findings in fact shows the various reductions to the Combined Agreement's agreed income that the Court imposed as the appropriate remedy for breaches found by the trial court, and making other adjustments under the Combined Agreement, itself. The trial court concluded that such schedule took into account "all reductions, offsets and credits for expenses otherwise paid as allowed by the Court" after considering all the claimed breaches. *See* Conclusion of Law Nos. 7-8.

Thus, the sole issue before this Court in the appeal of Finding of Fact No. 23, which is the finding Cross-Appellant appealed from, is whether there is substantial evidence to support a conclusion that PCG had some percentage interest in the income stream generated by Orlob's personal covenants, as the Jensens claimed, that would reduce what otherwise would be money Orlob would

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[2]*See also* Cross-Appellant's Opening Brief and Appellee's Brief, at Part V, pages 36-38, Part VII, pages 40-42 and Part VIII, pages 42-43.

receive from the income stream generated by his personal covenants.

III. THE DOCTRINE OF PRACTICAL CONSTRUCTION IS THE APPROPRIATE LEGAL TOOL TO INTERPRET THE INTENT OF THE PARTIES FROM THEIR CONDUCT IN PERFORMING UNDER THE COMBINED AGREEMENT.

The Opposition Brief's arguments concerning the doctrine of practical construction are two-fold: First, they argue that the application of the doctrine is a matter of discretion and it is not mandatory. There is no question that in many cases, application of the doctrine is unnecessary. In this case, however, the trial court specifically found that it was unable to determine from the plain language of the Combined Agreement how to allocate the income stream derived from Orlob's personal covenants. One might argue that, in the absence of any evidence, the presumption would be that the covenantor would naturally be intended to receive the income stream generated by the covenants and that, since there were arguably dual covenantors in this case, each was intended to receive one-half.

In this case, however, the trial court made specific findings as to the purpose of the Combined Agreement that call for application of the doctrine of practical construction. The starting point was that this was the sale of a business started by Orlob, Finding of Fact Nos. 1-2, 8, and that the only reason it was not a sale of stock was because the purchasers did not want to assume liability of the company as part of the purchase. *See* Finding of Fact No. 8.

The Opposition Brief's argument that "practical construction" shows something other than the parties' intention that Orlob would receive al the income

stream misses the mark in its interpretation of the doctrine. The doctrine flows not from arguments about what might have been intended, but rather, what intent does the actual performance of the contract show? *See* Cross-Appellant's Opening Brief and Appelllee's Brief at Part I, pages 14-17.

The Opposition Brief focuses on what it refers to as a more "probable explanation" for all checks being made out to Orlob, personally, but all that argument really constitutes is an effort to avoid looking at the actual performance of the Jensens in making every payment to Orlob, and no payment to PCG.[3] The Opposition Brief discuss Orlob's bankruptcy as a point for practical construction, but whether Orlob inadvertently omitted this asset from the schedules (along with the Jensens claims against him) or whether he included it, does not relate to performance of the Combined Agreement by the parties, which is what the doctrine of practical construction addresses.

The Opposition Brief's argument about Orlob's "understanding" of what the Jensens were going to do with the IRS, likewise, has no application in the doctrine of practical construction. First, nothing in the evidence ties that

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[3]The Opposition Brief's suggestion that Orlob's desire to move to California would somehow affect their willingness to pay for a non-compete agreement is simply another form of their arguments addressed previously as to the already-decided question of whether the plain language Combined Agreement itself established their interest in that regard. However, as in most situations where non-compete agreements create income streams, the income stream, itself, would allow a financial base for relocation, and relocation would make it less likely that the competition sought to be avoided would occur, so the payment to Orlob, individually, gives the Jensens exactly what they sought.

understanding to an intent at the time the Combined Agreement was entered into and, to the contrary, Finding of Fact No. 8 expressly finds that the Jensens were not going to assume any liabilities of PCG. Second, with respect to their actual performance, the question is: Did the Jensens perform by making payments to PCG? The answer is: They did not, at any time. Utah law is clear that when the parties to a contract "place their own construction on it ***and so perform,*** the court may consider this as ***persuasive evidence*** of what their true intention was." *Bullough v. Simms*, 400 P.2d 20, 22 (Utah 1965) (emphasis added). The Utah Supreme Court further explained the doctrine of practical construction as follows:

> It is true that the doctrine of practical construction may be applied only when the contract is ambiguous; but the question becomes ambiguous to whom? Where the parties have demonstrated by their actions and performance that to them the contract meant something quite different, the meaning and intent of the parties should be enforced. In such a situation, the parties by their actions have created the ambiguity to bring the rule into operation. If this were not the rule, the courts would be enforcing one contract when both parties have demonstrated that they meant and intended to [sic] the contract to be quite different.

Id. 271 (Utah 1972). Indeed, "a practical construction placed by the parties upon the instrument is the ***best evidence*** of their intention." *Upland Industries Corp. v. Pacific Gamble Robinson Co.*, 684 P.2d 638, 642 (Utah 1984) (quoting *Rosen v. E.C. Losch Co.*, 234 Cal. App. 2d 324, 331, 44 Cal. Rptr. 377, 381 (1965)) (emphasis added).

The Opposition Brief's argument about the "intrinsic value" of what the

Jensens purchased by way of PCG's assets. Again, they ignore the Finding of Fact Nos. 1-2, 8, that establish that this transaction, at its essence, was the sale of a business from Orlob to the Jensens, and that the single reason that it was structured as an asset transfer rather than a stock transfer was that the Jensens wanted to avoid any PCG liabilities. The "intrinsic value" under the Findings entered by the Court was, therefore, the purchase of a business from its sole owner.

CONCLUSION

The trial court resorted to an arbitrary reduction of the income stream payable to Orlob due to the lack of explicit instruction in the Combined Agreement itself. Such resort was error, however, because the trial court should have utilized the doctrine of practical construction to assist it in its legal construction of the contract. Since the Jensens performed by making each and every payment they made to Orlob, personally, and issued him, personally, a 1099, and they made no payments to PCG, the doctrine of practical construction calls for a reversal of the trial court's reduction of the income stream payable to Orlob, and a doubling of the judgment entered.

RESPECTFULLY SUBMITTED this 11 day of April, 2005.

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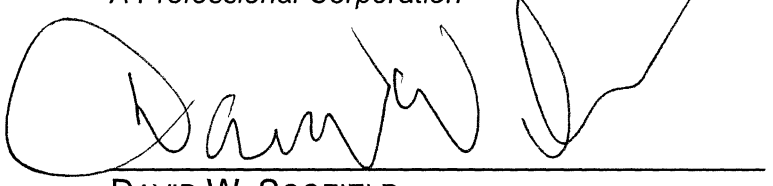

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the above and foregoing Cross-Appellant's Reply Brief were mailed, postage prepaid, this 11 day of April, 2005, to the following:

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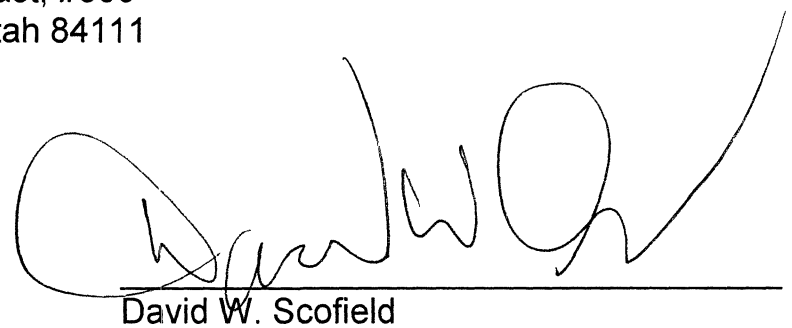

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